(3)

No. 90-1889

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IN THE

Supreme Court of the United States

October Term, 1990

JOSEPH FLUENT, Individually and as a representative of the Class of Salamanca Lessees holding 99-year leases from Seneca Nation of Indians; JAMES V. MONGILLO, Individually and as a representative of the class of Salamanca lessees holding 50-year leases from the Seneca Nation of Indians and KEITH MCCLAIN, Individually and as a representative of the class of congressional village lessees holding 99-year leases from the Seneca Nation of Indians; ROBERT ADAMIC, Individually and on behalf of the class of lessees who signed the "40/40 Lease" Tendered by the Seneca Nation of Indians on or about September 4, 1990; MARILYN ADAMIC, Individually and on behalf of the class of lessees who signed the "40/40 Lease" Tendered by the Seneca Nation of Indians on or about September 4, 1990; SALAMANCA COALITION OF UNITED TAXPAYERS, INC., Individually and on behalf of its membership,

Petitioners,

vs.

SALAMANCA INDIAN LEASE AUTHORITY; DAVID FRANZ, Individually and as Attorney for the City of Salamanca Indian Lease Authority; ANTONIO CARBONE, Individually and as Mayor of the

Respondents.

(Additional Respondents continued inside Front Cover.)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS OTHER THAN THE SENECA NATION OF INDIANS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

R. WILLIAM STEPHENS
Counsel of Record
410 Main Street
Buffalo, New York 14202
Telephone: (716) 852-7587
Attorney for Respondents Other Than the Seneca Nation of Indians

Of Counsel:
DAVID M. FRANZ

Batavia Times Publishing Co.
Batavia, New York (716) 344-2000

(Additional Respondents.)

City of Salamanca and also as member of the Salamanca Indian Lease Authority; CITY OF SALAMANCA; PATRICK CALLAGHAN, Individually and as Chairman of the Salamanca Indian Lease Authority; LINDA RYCHCIK, Individually and as member of the Salamanca Indian Lease Authority; HENRY STEFANSKI, Individually and as a member of the Salamanca Indian Lease Authority; OWEN K. PHILLIPS, Individually and as a member of the Salamanca Indian Lease Authority; DANN COLVIN, Individually and as a member of the Salamanca Indian Lease Authority; PAUL TAYLOR; PENNY BUCKLEY; SENECA NATION OF INDIANS,

Respondents.

QUESTIONS PRESENTED

1. Does the Act of 1875, which is silent on the subject of sovereign immunity, provide for waiver of sovereign immunity of the Seneca Nation?

2. Does the Act of 1875 provide for perpetual lease renewals when the Act does not so state *in haec verba*?

3. Does the Rule 19 dismissal of count 10, based on the doctrine of sovereign immunity, deprive petitioners of constitutional rights?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 29.1, all parties to the proceeding are listed in the caption.

TABLE OF CONTENTS.

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CASES	iv
PRELIMINARY STATEMENT	1
STATEMENT OF CASE	3
REASONS FOR DENYING THE WRIT	8
(a) The decision below was correct	8
(b) Petitioners are not entitled to successive renewals	9
(c) Congress has spoken on the question	10
(d) The conflict between the circuit courts is illusory	10
(e) The Rule 19 dismissal was proper	11
(f) Petitioners have been deprived of no rights	13
CONCLUSION	16
APPENDIX:	
Act of Feb. 19, 1875, ch. 90, 18 Stat. 330 (1875)	1ra
Act of Sept. 30, 1890, ch. 1132, 26 Stat. 558 (1890)	5ra
Seneca Nation Settlement Act of 1990, Pub. L. No. 101-503, 104 Stat. 1292 (1990)	6ra

TABLE OF CASES.

Page

Bakia v. County of Los Angeles, 687 F.2d 299 (9th Cir. 1982) 13

Barnes v. White, 494 F. Supp. 194 (N.D.N.Y. 1980) 11

Cloverleaf Standardbred Owners Assoc. v. National Bank, 699 F.2d 1274 (D.C. Cir. 1983) 12

Dellmuth v. Muth, 491 U.S. _____, 109 S. Ct. 2397 (1989) 15

Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980) 10,11

Enterprise Mgt. Consultants v. U.S. *ex rel.* Hodel, 883 F.2d 890 (10th Cir. 1989) 11

Fluent v. Salamanca Indian Lease Authority, No. 90 Civ. 1229A (W.D.N.Y. January 25, 1991) 7,12

Fluent v. Salamanca Indian Lease Authority, 928 F.2d 542 (2d Cir. 1991) 2,7,9,10,13,15

Fluent v. Salamanca Indian Lease Authority, 57 U.S.L.W. 3741 (U.S. April 29, 1991) 7

Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324 (10th Cir. 1982) 11

Nero v. Cherokee Nation, 892 F.2d 1457 (10th Cir. 1989) 10,11

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. _____, 111 S. Ct. 905 (1991) 1,8

Owens-Illinois, Inc. v. Lake Shore Land Co., Inc., 610 F.2d 1185 (3rd Cir. 1979) 13

Ramey Construction Co. v. Apache Tribe, 673 F.2d 315 (10th Cir. 1982) 11

R.J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979 (9th Cir. 1983) 11

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) . 1,8

Seneca-Cayuga Tribe v. State *ex rel.* Thompson, 874 F.2d 709 (10th Cir. 1989) 11
Seneca Nation of Indians v. Appleby, 196 N.Y. 318 (1902) 8
Snow v. Quinault Indian Nation, 709 F.2d 1319 (9th Cir. 1983) 11
Stroud v. Seminole Tribe, 574 F. Supp. 1043 (S.D. Fla. 1983) 11
Trans-Canada Enterprise, Ltd. v. Muckleshoot Indian Tribe, 634 F.2d 474 (9th Cir. 1980)..... 11
United Nuclear Corp. v. Clark, 584 F. Supp. 107 (D.D.C. 1984)..... 11
United States v. Forness, 125 F.2d 928 (2d Cir. 1942) 2,5
United States v. King, 395 U.S. 1 (1969) 1,15
United States v. Testan, 424 U.S. 392 (1976)..... 1,15
Walsh v. Centeio, 692 F.2d 1239 (9th Cir. 1982).... 12,13
White v. Pueblo of San Juan, 728 F.2d 1307 (10th Cir. 1984) 11
Wichita and Affiliated Tribes v. Hodel, 788 F 2d 765 (D.C. Cir. 1986) 11
Williams v. Pyramid Lake Paiute Tribe, 625 F. Supp. 1457 (D. Nev. 1986)..... 11

STATUTES.

Act of 1790, Ch. 33, §4, 1 Stat. 137..... 3
Act of 1834, §12, 4 Stat. 729 3
Act of 1875, 18 Stat. 330 (1875)..... *passim*
Section 7 8
Section 3 9
Act of 1890, 26 Stat. 558 (1890) 2,5,7,9
Seneca Nation Settlement Act of 1990, Pub. L. No. 101-503, 104 Stat. 1292 (1990) 2,5,10,12,13,14
Section 2(b)(1)..... 10,13
Section 2(b)(3)..... 14

RULE.

Federal Rules of Civil Procedure:

Rule 19 7,12,15

OTHER AUTHORITIES.

Gover, *Avoiding* Santa Clara Pueblo v. Martinez: *The Litigation in Federal Court of Civil Actions under the Indian Civil Rights Act*, 8 Hamline L. Rev. 497 (1985) 11

House of Representatives Miscellaneous Document No. 75, January 29, 1875 3

Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058 (1982) 11

Wright & A. Miller, Federal Practice and Procedures, §1604 (1972) 13

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No. 90-1889

JOSEPH FLUENT, *et al.*,

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vs.

SALAMANCA INDIAN LEASE AUTHORITY, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS OTHER THAN THE SENECA NATION OF INDIANS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

This Court, on February 26, 1991, again held that Indian Tribes are immune from suit in the absence of an unequivocal expression of waiver of immunity by Congress. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. _____, 111 S. Ct. 905 (1991); *cf. Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), and cases cited therein. No reason has been advanced in this petition why this Court should hear this case because the applicable principles of law are well established and recently confirmed by this Court. A resort to legislative history cannot furnish evidence of waiver as claimed by petitioners. The waiver must be "unequivocally expressed." *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. King*, 395 U.S. 1, 4 (1969)).

The issues sought to be raised in this petition have been fully considered by the Congress of the United States (the "Congress"). As early as November 7, 1985, testimony was taken before the House Committee on Interior and Insular Affairs concerning the leases, which were to expire some five years hence. Hearings were held in the House and Senate in 1990. Congress' response was the Seneca Nation Settlement Act of 1990 which required the parties to negotiate the terms and conditions of a new lease agreement among themselves. Pub. L. No. 101-503, 104 Stat. 1292 (See Appendix 6ra-17ra). The Act also provided Federal and State funds to compensate the Seneca Nation (the "Nation") for lost revenues over past years occasioned by unconscionably low rents under leases of a "kind that may shock even a calloused conscience." *United States v. Forness,* 125 F.2d 928, 947 (2d Cir. 1942). Congress made no mention in the 1990 Act of renewability of leases. In fact, the leases in question have been renewed twice pursuant to the Congressional Act of 1875. 18 Stat. 330 (Appendix 1ra-4ra); once in 1880 and again in 1892. The second renewal in 1892 was for a term of 99 years, which was provided by an Act of Congress passed in 1890. Act of 1890, 26 Stat. 558 (5ra). The United States Court of Appeals for the Second Circuit, which had before it the relevant statutes and the legislative history on the issue, specifically found that the lessees did not have a right of renewal as claimed by the petitioners. *Fluent v. Salamanca Indian Lease Authority,* 928 F.2d 542 (2d Cir. 1991) (1a-14a).

The holding of the courts below that the Seneca Nation is immune from suit is, in all respects, correct; the claim by the petitioners that their leases are renewable under the statute of 1875 is factually wrong. For these reasons, the petition for writ of certiorari should be denied.

STATEMENT OF CASE

In the mid-nineteenth century neither tribes of Indians nor individual Indians had authority to lease Indian lands, and non-Indians were prohibited from leasing Indian lands.[1] Nevertheless, operating upon the assumption that the State of New York could sanction such leasing of lands individual Indians possessed of allotted lands and the Seneca Nation of Indians leased lands on the Allegany Reservation of the Seneca Nation of Indians to non-Indians including railroads constructed through the Allegany Indian Reservation.[2]

As a result of both geographical factors and historical accident, the railroads expanding both east and west and north and south intersected in a place which has come to be known as the City of Salamanca. Most of the City lies within the Allegany Reservation of the Seneca Nation of Indians. Railroad operators and white settlers negotiated with both the Seneca Nation and individual Indians and subsequently entered into lease agreements for land on the reservation which runs a distance of approximately 40 miles along the shore of the Allegheny River.

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[1] The first version of the Nonintercourse Act was passed under the title of "An act to regulate the trade and intercourse with the Indian Tribes." Act of July 22, 1790, Ch. 33, §4, 1 Stat. 137 (current version at 25 U.S.C. §177 (1976)). The 1790 version provides:

> Sec. 4 . . . That no sale of lands made by any Indians or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

By a later version of the Act, June 30th, 1834, §12, 4 Stat. 729, 730 the prohibition was extended to "no lease . . . or of any title thereto . . . ." The Nation was granted authority to lease the lands at issue under the 1875 Act. (1ra-4ra).

[2] House of Representatives Miscellaneous Document No. 75, January 29th, 1875, reciting: "Whereas the legislature of the State of New York has at different times ratified and confirmed leases between Indian and white settlers on the Allegany Reservation in said state . . . "

Prior to February, 1875, a New York Supreme Court decision voided all such leases as being beyond state authority and recognized the plenary authority of Congress in the matter of the transfer of Indian reservation lands.

The unauthorized leases issued in the 1850's covered lands in the then Villages of Salamanca, New York, and West Salamanca (later merged into the City of Salamanca) as well as surrounding areas later identified as the congressional villages of Great Valley, Red House, Carrollton and Vandalia.

The lessees had significantly improved the Indian lands with railroads, schools, bridges, homes, businesses and all improvements normally associated with established communities.

Congress was called upon to provide a resolution to the situation and did so by enacting the act of February 19, 1875, ch. 90, 18 Stat. 330, "An act to authorize the Seneca Nation of New York Indians to lease lands within the Cattaraugus and Allegany Reservations, and to confirm existing leases."[3]

The objective of the congressional legislation was to prevent the eviction of the non-Indians who had effected significant improvements on the Indian land, authorize the Nation to lease lands within both Cattaraugus and Allegany reservations, to railroads, and to lease lands within the Allegany reservation in areas defined by a survey directed to be made by said act of 1875 and designated congressional villages. The existing, unauthorized leases were ratified and confirmed.

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[3] For the convenience of the Court the Act of February 19, 1875 is in the appendix to this brief at 1ra to 4ra.

Petitioners are a group of residents and property possessors in the City of Salamanca who are unhappy with the terms of a compromised lease agreement offered as a replacement to a 99-year lease which expired on February 19, 1991. Dissatisfied with the lease terms, the petitioners, instead of seeking to negotiate further with the Seneca Nation, insisted that they had the right to renew for a period of 99 years and the attendant benefits of arbitration. (553a-559a, 560a-565a, 566a-575a). The Seneca Nation refused. (560a-565a). The petitioners brought suit against the Nation, the Salamanca Indian Lease Authority and its individual members.

The Act of 1875 (18 Stat. 330 (1ra-4ra)) also provided that where a non-Indian was a lessee and made land improvements, the lease was renewable for a period of 12 years with a further renewal period for 12 years. In 1892, the second renewal provided for in the 1875 Act was exercised. However, by the Act of 1890, the second renewal period was changed from 12 years to a period of 99 years. 26 Stat. 558 (5ra). It is the leases ratified in the 1875 Act, renewed in 1880 for a period of 12 years, and renewed in 1892 for a period of 99 years, with which we are mainly concerned in this litigation.[4]

Congress has been attentive to the developing lease situation in Salamanca. Hearings were held before Senate and House Committees regarding the problems created on expiration of the leases including sessions held in 1985 and 1990. Informed by the hearings, Congress passed the Seneca Nation Settlement Act of 1990. Pub. L. No. 101-503, 104 Stat. 1292 (6ra-17ra). The Act of 1990 provided that the Nation and the lessees were to

[4] Other leases commonly referred to as Forness leases were signed in the 1940's after the lessees had defaulted on the rent payments. *See United States v. Forness*, 125 F.2d 928 (2d Cir. 1942). Other leases were entered into in the 1980's and provide for terms of fifty years.

work out among themselves the terms of any new lease agreement. In addition, because the original leases called for nominal annual rent payments of $.50 or $1.00 per year, the Act also provided money to compensate the Seneca Nation for the inequitable rents received for the property over the past 115 years. Congress specifically avoided stating what the result of the negotiations should be preferring that the parties negotiate among themselves.

The Salamanca Indian Lease Authority (the "Authority) was created by New York State statute in 1969. The Authority began negotiating with the Seneca Nation soon thereafter. Negotiations did not run smoothly. Serious differences arose between the parties concerning the right of renewal, value of the property, fair rents, and the value of improvements. More recently, the Authority obtained written authorizations from all but a few of the lessees to represent the lessees in these negotiations. A proposed lease package was arrived at and the Authority recommended that the City of Salamanca report the status of negotiations to Congress. The Authority and the City, however, left it to the individual lessees whether they wished to enter into a new lease under such terms as offered by the Seneca Nation.[5]

The lease agreement generally provided for a lease period of 40 years with a clear and unencumbered right to renew for 40 years upon the condition that all rent payments have been made. It also provided for increased rental payments; the annual rent increasing from what was $.50 to a $1.00 to approximately $150.00 to $200.00

[5] The petition states that the Lease Authority "agree[d] to the 40/40 lease apparently on behalf of the lessees" (Petition at p. 9 n.7); this is not so. Both the City and the Lease Authority thought the lease agreement was the most favorable the Nation would grant but the decision to enter into the lease was left to the lease holders.

per year per lease. The parties to the lease agreement reserved all rights under the Act of 1875 and all rights to renew if any existed.

The Seneca Nation moved to dismiss in the District Court on the grounds of sovereign immunity. The District Court agreed and dismissed the case as to the Nation. *Fluent v. Salamanca Indian Lease Authority,* No. 90 Civ. 1229A (W.D.N.Y. January 25, 1991) (49a-65a). The Court also dismissed related counts of the complaint as to which the Nation was an indispensable party under Rule 19. Fed. R. Civ. P. 19. The Second Circuit affirmed on the ground that the Act of 1875 did not specifically provide for waiver of sovereign immunity. *Fluent v. Salamanca Indian Lease Authority,* 928 F.2d 542 (2d Cir. 1991) (1a-14a). The Court went on to articulate that in the absence of an unequivocal legislative intent to waive sovereign immunity, the Nation was immune from suit. Moreover, the Second Circuit examined the relevant statutes and legislative history, including the Act of 1875 and the Act of 1890, to determine if the petitioners had a right to renew. (10a-11a). The Court found that there was no right to renew and that the leases already had been renewed on two occasions, thus fulfilling the terms of the Act of 1875. (10a). The petitioners sought to stay the mandate in the Second Circuit and their motion was denied. The petitioners also sought to stay the mandate in this Court and that application was denied by an individual justice and then by the full Court. *Fluent v. Salamanca Indian Lease Authority,* 57 U.S.L.W. 3741 (U.S. April 29, 1991).

REASONS FOR DENYING THE WRIT

(a) The decision below was correct

This petition raises no issue on which there could be any serious doubt. The sovereign immunity of the Seneca Nation is beyond question.[6] This Court has consistently held that the waiver of sovereign immunity must be clearly and unequivocally expressed in the language of the statute itself in order to be effective. Attempts by the petitioners to quote snippets of statements made by those who were uninformed about the proposed legislation or against the legislation are futile. The language in section 7 of the 1875 Act, which gives the Nation the right to sue to enforce the lease, is insufficient to provide the unequivocal expression of waiver.[7] This Court has repeatedly held that an

[6] We leave to the Seneca Nation of Indians to fully set forth in their brief in opposition the correctness of the ruling on sovereign immunity. Suffice it to say for our purposes that the doctrine was fully examined by this Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). This Court's most recent approval of the doctrine is found in *Potouatomi*, which also includes the proposition that clear congressional abrogation is required. 498 U.S. _____, 111 S. Ct. 905 (1991).

[7] Petitioner seeks to make much of section 7 of the Act of 1875 arguing that because it provides for access to courts, it should be construed as a congressional waiver of sovereign immunity. The language of section 7 ties rent recovery with the recovery of possession. Only a lessor would seek to recover possession or rent. The statutes states that the circuit and district courts "[s]hall have jurisdiction of all actions for the recovery of rents and for the recovery of possession of real property. . . ." The additional actions referred to in this section are also actions typically commenced by a lessor, such as debt, ejectment, forcible entry, detainer and unlawful detainer. It is not surprising that Congress provided the Seneca Nation with definite and explicit access to courts to recover their land. Indians in the State of New York could not bring an action in the courts of New York until 1892. *Seneca Nation of Indians v. Appleby*, 195 N.Y. 318 (1902). In the main, petitioner's quotes are those which follow the expression of a need for a forum for the Indian, not a forum for the non-Indian.

unequivocal expression of such a waiver is required to establish that Congress has waived the sovereign immunity of an Indian tribe.

(b) Petitioners are not entitled to successive renewals

Petitioners are simply wrong concerning their claim that they are entitled to successive renewals under the Act of 1875.[8] The Second Circuit had before it the applicable statutes and legislative history on the subject and carefully examined the issue. It found:

> that the renewal provisions of 1875 Act applied only to the original renewals and do not extend to the present renewals. Section 3 of the 1875 Act validated leases existing at that time for a five-year term and authorized the term of renewal "not exceeding twelve years." The 1875 Act also provided that "whenever any lease shall expire after its renewal . . ., it may, at the option of the lessee, his heirs or assigns, be renewed in the manner hereinbefore provided." The 1890 Act amended the 1875 Act to allow renewal for "a term not exceeding ninety-nine years, instead of the term of 12 years." Thus the leases that expired on February 19, 1991 are leases that previously were renewed a second time for a term of 99 years. The 1875 Act does not

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[8] It is disingenuous for the petitioners to proclaim, as they do at page 6 of the petition, that "Each 99-year lease expressly provides for a renewal term up to 99 years upon expiration on February 19, 1991."

The lease provides "[a]lso to quit and deliver up to the party of the first part said land and premises at the expiration of said term, unless he shall procure this lease to be renewed in the manner provided by said Acts of Congress." (453a).

The Act of 1875 in section 3 provides for two renewals; one occurred in 1880 (for a period of twelve years) and one for an additional period of up to 12 years. The Act of 1890 changed the 12 year period to 99 years; thus, all rights to renew provided in the Act of 1875 have been exercised.

> authorize a perpetual renewal, and without clear language to that effect, we will not construe the statute to confer such a right. See *Winslow v. Baltimore and Ohio R.R. Co.*, 188 U.S. 646, 654-55, 23, S. Ct. 443, 446, 47 L.Ed. 635 (1903) (plain language necessary to establish intent to provide right of perpetual renewal); *McLean v. United States*, 316 F. Supp. 827, 829 (E.D. Va. 1970) ("[t]he intent to create a perpetual lease must appear in clear and unequivocal language"); *McMillian v. Malvern Gravel Co.*, 136 F. Supp. 567, 574 (W.D.Ark. 1955) (same); 50 Am.Jur.2d *Landlord and Tenant*, §1171 (1970).
>
> 928 F.2d at 546-7 (10a-11a).

(c) Congress has spoken on the question

The Act of Congress of 1990 provided that the parties were to negotiate their differences and come up with a new lease. Congress had before it the provisions of the lease agreement tentatively arrived at and supported the agreement ("to effectuate and support the Agreement . . . and facilitate the negotiation of new leases . . ." Section 2(b)(1) (See Appendix to this brief at 8ra)). Congress provided for payments to the Seneca Nation to make up for the shortfall in revenue over the past many years. Congress' directive to the parties to agree on the terms of a new lease is inconsistent with a right of further renewal.

(d) The conflict between the circuit courts is illusory

The claimed circuit court conflict regarding sovereign immunity is not one which needs to be resolved by this Court. The Tenth Circuit has recognized that its decision in *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), is questionable and has repeatedly refused to follow the holding. *Nero v.*

Cherokee Nation, 892 F.2d 1457 (10th Cir. 1989); *Enterprise Mgt. Consultants v. U.S. ex rel. Hodel*, 883 F.2d 890 (10th Cir. 1989); *Seneca-Cayuga Tribe v. State ex rel. Thompson*, 874 F.2d 709 (10th Cir. 1989); *White v. Pueblo of San Juan*, 728 F.2d 1307 (10th Cir. 1984); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir. 1982); *Ramey Construction Co. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315 (10th Cir. 1982).

Likewise, other Circuit Courts and District Courts have declined to apply *Dry Creek Lodge*, and the decision has been roundly criticized by commentators. *See, e.g., R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983); *Snow v. Quinault Indian Nation*, 709 F.2d 1319 (9th Cir. 1983); *Trans-Canada Enterprise, Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474 (9th Cir. 1980); *Wichita and Affiliated Tribes v. Hodel*, 788 F.2d 765 (D.C. Cir. 1986); *Williams v. Pyramid Lake Paiute Tribe*, 625 F. Supp. 1457 (D. Nev. 1986); *United Nuclear Corp. v. Clark*, 584 F. Supp. 107 (D.D.C. 1984); *Stroud v. Seminole Tribe*, 574 F. Supp. 1043 (S.D.Fla. 1983); *Barnes v. White*, 494 F. Supp. 194 (N.D.N.Y. 1980). *See also* Gover, *Avoiding* Santa Clara Pueblo v. Martinez: *The Litigation in Federal Court of Civil Actions under the Indian Civil Rights Act*, 8 Hamline L. Rev. 497 (1985); Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058 (1982).

(e) The Rule 19 dismissal was proper

The petitioners filed a complaint which named the Seneca Nation of Indians and the Salamanca Indian Lease Authority and its individual members as

defendants and claimed that they were entitled to a renewal lease for a full 99-year term. They also claimed that the statute creating the Salamanca Indian Lease Authority was unconstitutional and illegal. Moreover, they claimed that the Seneca Nation Settlement Act of 1990 was unconstitutional. The District Court, in addition to dismissing the complaint as to the Seneca Nation of Indians (49a-59a), determined that the Seneca Nation was an indispensable party with respect to the agreement between the City and the Nation and that the Seneca Nation was an indispensable party *in this suit* as to claims regarding the unconstitutionality of the Seneca Nation Settlement Act of 1990. (6ra-17ra).

Contrary to the claims of the petitioners, the dismissal of count ten (10) under Rule 19 does not mean that no effective constitutional challenge could ever be made to the Seneca Nation Settlement Act of 1990. Petitioners merely had to name the United States or an officer of the federal government acting under the statute as a defendant in a separate action *without naming the Nation* to test the constitutionality of the statute. The mere fact that payments are to be made to the Seneca Nation would not mean that the Nation was an indispensable party to any suit seeking to raise the constitutionality of the statute. Indeed, there are many ways in which a party possessing necessary standing can test the constitutionality of the statute without naming parties who may have a financial interest in the law. In any event, the District Court did not abuse its discretion in this case in finding that the Seneca Nation was an indispensable party in the action as pled by petitioners. *See Cloverleaf Standardbred Owners Assoc. v. National Bank*, 699 F.2d 1274 (D.C. Cir. 1983); *Walsh*

v. Centeio, 692 F.2d 1239 (9th Cir. 1982); *Bakia v. County of Los Angeles,* 687 F.2d 299 (9th Cir. 1982); *Owens-Illinois, Inc. v. Lake Shore Land Co., Inc.,* 610 F.2d 1185 (3rd Cir. 1979). *See also* Wright & A. Miller, *Federal Practice and Procedures,* §1604 at 45-46 (1972).

(f) Petitioners have been deprived of no rights

The first cause of action dismissed (cause of action one) sought a declaratory judgment against the Nation that the Act of 1875 and the leases issued under the authority of said act provided the lessees with continuous renewability of existing leases, a 99-year term, and the employment of arbitration for resolution of the terms, conditions, and amount of annual rental which could not be agreed upon through negotiation. It is this claimed right that petitioner asserts has been denied by reason of sovereign immunity and lack of forum. The reality is petitioners have no such right as determined by the Second Circuit in holding that all renewals provided for under the act of 1875 had been accorded the lessees.

The dismissal of petitioners' eighth cause of action, petitioners allege, deprives them of the right to a declaratory judgment that the agreement between the city and Nation of July 1990 is invalid and unconstitutional as an exercise of rights reserved exclusively to Congress. This is pedantic. The Seneca Nation Settlement Act of 1990, *supra,* specifically provides that, "It is the purpose of this act—(1) to effectuate and support the Agreement between the city and the Seneca Nation, and facilitate the negotiation of new leases with lessees in the congressional villages." (Act Sec. 2 (b)(1)). Congress having declared its support of such agreement has provided ratification for that

which petitioners themselves urge is the prerogative of Congress. Consequently, no rights of petitioners have been denied.

The dismissal of petitioners tenth cause of action has, likewise, not denied petitioners any rights, constitutional or otherwise. The petitioners' tenth cause of action sought to declare the Seneca Nation Settlement Act of 1990 void and unconstitutional. Petitioners have not been deprived of any opportunity to challenge the cited act. It is simply a question of petitioner having improperly postured the challenge in an action against the Seneca Nation as opposed to an action, predicated upon proper standing, against the proper dependants.

The petitioners were offered a lease by the Seneca Nation, to accept or reject in its offered form. Congress, after hearings and complete review of the lease situation ordained that the petitioners negotiate for a lease and Congress stated that its purpose was not only to effect resolution by negotiation but provided that the very lease offered by the Nation could be negotiated (*see* Seneca Nation Settlement Act of 1990, Sec. 2 (b)(3)). Instead, petitioners sought to litigate the issue of renewability, 99-year term and arbitration for terms and conditions, and annual rental. Petitioners further sought to prevent negotiation of the lease process to completion by denying the Nation the reparation monies to be provided by Congress as a condition precedent to the Nation's offer of lease. The petitioners' inability to accomplish their desired ends has not resulted in any deprivation of rights. Each challenge has been correctly denied by the courts below.

The petitioners choose to rely on a quotation from an obscure historian which states that there was an additional renewal period rather than on the Second Circuit which has clearly ruled that both renewals provided for in the 1875 Act have already taken place. A plain reading of the statutes involved establishes that the petitioners do not have a perpetual right of renewal.

The reasons advanced for granting the writ are flawed. There is a specific canon of construction involving statutes which claim to waive the sovereign immunity of Indians. The rule of construction is that the waiver must be "unequivocally expressed" and cannot be implied. *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. King*, 395 U.S. 1, 4 (1969)). Legislative history cannot be used to supply the unequivocal expression. "If Congress' intention is 'unmistakably clear in the language of the statute,' recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile . . ." *Dellmuth v. Muth*, 491 U.S. _____, 109 S. Ct. 2397, 2401 (1989) (quoted with approval by Second Circuit. *Fluent*, 928 F.2d at 546-7 (9a)). The language in implementation of the Act of 1875 discloses, as the Second Circuit has set forth, that there are no more renewals available to petitioners. Therefore, the petitioners have no right or entitlement to another renewal and have not been deprived of constitutional rights by the application of the doctrine of sovereign immunity. The Rule 19 dismissal of the other counts of the complaint, in which the Seneca Nation is an indispensable party, was proper under the decided cases.

CONCLUSION

The Act of 1875 provided for two renewals which subsequently occurred in 1880 and 1892. There is no further right to renew. Thus, the petitioners have been deprived of no right by the decision of the court sought to be reviewed in this Court by certiorari. The Act of 1875 does not contain an unequivocal expression of intent to waive sovereign immunity and the Seneca Nation is immune from suit. The decision of the court below dismissing the case against the Seneca Nation is correct in all respects and the petition for certiorari should be denied.

Dated: Buffalo, New York
June 20, 1991

Respectfully submitted,

R. WILLIAM STEPHENS
Counsel of Record
410 Main Street
Buffalo, New York 14202
Telephone: (716) 852-7587

Attorney for Respondents Other Than the Seneca Nation of Indians

Of Counsel:
DAVID M. FRANZ

APPENDIX

Act of Feb. 19, 1875, ch. 90, 18 Stat. 330 (1875)

"CHAP. 90.—An act to authorize the Seneca Nation of New York Indians to lease lands within the Cattaraugus and Allegany reservations, and to confirm existing leases.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all leases of land with the Cattaraugus and Allegany reservations in the State of New York, heretofore made by or with the authority of the Seneca Nation of New York Indians, to railroad corporations, are hereby ratified and confirmed; and said Seneca Nation may, in accordance with their laws and form of government, lease lands with said reservations for railroad purposes.

"SEC. 2. That the President of the United States shall appoint three commissioners, whose duty it shall be, as soon as may be, to survey, located and establish proper boundaries and limits of the villages of Vandalia, Carrolton, Great Valley, Salamanca, West Salamanca, and Red House, within said Allegany reservation, including therein, as far as practicable, all lands now occupied by white settlers and such other lands as, in their opinion, may reasonably be required for the purposes of such villages; and they shall cause a return of their doings in writing, together with maps of such surveys and locations duly certified by them, to be filed in the office of the county clerk of the county of Cattaraugus in said State, there to be recorded and preserved. The boundaries of said villages so surveyed, located, and established shall be the limits of said villages for all the purposes of this act.

"SEC. 3. That all leases of land situate within the limits of said villages when established as hereinbefore provided, except those provided for in the second section of this act, in which Indians or said Seneca Nation, or persons claiming under them are lessors, shall be valid and binding upon the parties thereto, and upon said Seneca Nation for a period of five years from and after the passage of this act, except such as by their terms may expire at an earlier date; and at the end of said period, or at the expiration of such leases as terminate within that time, said nation through its councillors shall be entitled to the possession of the said lands, and shall have the power to lease the same: *Provided, however,* That at the expiration of said period, or the termination of said leases, as hereinbefore provided, said leases shall be renewable for periods not exceeding twelve years, and the persons who may be at such time the owner or owners of improvements erected upon such lands, shall be entitled to such renewed leases, and to continue in possession of such lands, on such conditions as may be agreed upon by him or them and such councillors; and in case they cannot agree upon the conditions of such leases, or the amount of annual rents to be paid, then the councillors shall appoint one person, and the other party or parties shall choose one person, as referee to fix and determine the terms of said lease and the amount of annual rent to be paid; and if the two so appointed and chosen cannot agree, they shall choose a third person to act with them, the award of whom, or the major part of whom, shall be final and binding upon the parties; and the person or persons owning said improvements shall be entitled to a lease of said land and to occupy and improve the same according to the terms of said award, he or they paying rent and otherwise complying with the said lease or said award; and whenever any lease shall

expire after its renewal as aforesaid, it may, at the option of the lessees, his heirs or assigns, be renewed in the manner hereinbefore provided.

"SEC. 4. That said Seneca Nation is hereby authorized, by resolution of its councillors, duly elected according to the laws and the system of government of said nation, or in such other manner as said nation in council may determine, to lease lands within said villages to which, by the laws or customs of said nation, no individual Indian or Indians, or other person claiming under him or them, has or is entitled to the rightful possession.

"SEC. 5. That it shall be the further duty of the said commissioners to cause all lands within such villages now leased, as hereinbefore mentioned, to be surveyed and defined as near as may be, and to cause the same to be designated upon the maps of such villages hereinbefore mentioned and provided for. All leases of lands within the said villages, whether now existing or hereafter to be made under the provisions of this act, shall be recorded in the office of the clerk of said county of Cattaraugus in the same manner and with like effect as similar instruments relating to lands lying in said county outside of said reservations are recorded by the laws of said State of New York. All leases herein mentioned or provided for shall pass by assignment in writing, will, descent, or otherwise in the manner provided by the laws of said State: *Provided, however,* That the rights of Indians in such leases shall descend as provided by the laws of said Seneca Nation.

"SEC. 6. That all moneys arising from rents under the provisions of this act which shall belong to said Seneca Nation shall be paid to and recoverably by the treasurer

of said Seneca Nation, and expended in the same manner and for the same purposes as are other revenues or moneys belonging to said Seneca Nation.

"SEC. 7. That the courts of the State of New York within and for the county of Cattaraugus, having jurisdiction in real actions, and the circuit and district courts of the United States in and for the northern district of said State, shall have jurisdiction of all actions for the recovery of rents and for the recovery of possession of any real property within the limits of said villages, whether actions of debt, ejectment, or other forms of action, according to the practice in said courts; and actions of forcible entry and detainer, or of unlawful detainer arising in said villages, may be maintained in any of the courts of said county which have jurisdiction of such actions.

"SEC. 8. That all laws of the State of New York now in force concerning the laying out, altering, discontinuing, and repairing highways and bridges shall be in force within said villages, and may, with the consent of said Seneca Nation in council, extend to, and be in force beyond, said villages in said reservation, or in either of them; and all municipal laws and regulations of said State may extend over and be in force within said villages: *Provided, nevertheless,* That nothing in this section shall be construed to authorize the taxation of any Indian, or the property of any Indian not a citizen of the United States.

Approved, February 19, 1875."

Act of Sept. 30, 1890, ch. 1132,
26 Stat. 558 (1890)

"CHAP. 1132.—An act to authorize the Seneca Nation of New York Indians to lease lands within the Cattaraugus and Allegany Reservations, and to confirm existing leases.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That whenever the leases of land situate within the limits of the villages mentioned in the act of Congress entitled 'An Act to authorize the Seneca Nation of New York Indians to lease lands within the Cattaraugus and Allegany Reservations, and to confirm existing leases,' approved February nineteenth, eighteen hundred and seventy-five, except leases to railroads, shall by the terms of said act be renewable, the same shall be renewable for a term not exceeding ninety-nine years, instead of the term of twelve years, as therein provided, subject to all other terms and conditions of said act.

Approved, September 30, 1890."

Seneca Nation Settlement Act of 1990,
Pub. L. No. 101-503, 104 Stat. 1292 (1990)

"An Act

"To provide for the renegotiation of certain leases of the Seneca Nation, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

"SECTION 1. SHORT TITLE.

"This Act may be cited as the 'Seneca Nation Settlement Act of 1990'.

"SEC. 2. FINDINGS AND PURPOSES.

"(a) CITY OF SALAMANCA AND CONGRESSIONAL VILLAGES.—The Congress finds and declares that:

(1) Disputes concerning leases of tribal lands within the city of Salamanca and the congressional villages, New York, have strained relations between the Indian and non-Indian communities and have resulted in adverse economic impacts affecting both communities.

(2) Some of the significant historical events which have led to the present situation include—

(A) beginning in the mid-nineteenth century, several railroads obtained grants or leases of rights of way through the Allegany Reservation without Federal authorization or approval and on terms which did not adequately protect the interests of the Seneca Nation;

(B) after construction of these railroads, Allegany Reservation lands were leased to railroad employees, persons associated with the railroads, residents of the city and farmers without Federal authorization or approval and on terms which did not adequately protect the interests of the Seneca Nation;

(C) none of these leases had Federal authorization or approval and, after the courts ruled these leases invalid, Congress enacted the Act of February 19, 1875 (18 Stat. 330), confirming existing leases of Allegany Reservation lands, authorizing further leasing by the Seneca Nation, and making the confirmed leases renewable for a twelve year period;

(D) the Act of September 30, 1890 (26 Stat. 558), amended the 1875 Act by substituting a renewal term of 'not exceeding ninety-nine years' for the original renewal term of twelve years; and

(E) in 1952 the Seneca Nation filed a claim with the Indian Claims Commission against the United States for use of improper lease fees, and in 1977 a settlement was reached regarding such claim, providing for the payment of $600,000 to the Seneca Nation covering the period beginning in 1870 to the end of 1946.

(3) An analysis of historic land values indicates that the payments made under the original lease agreement and under the settlement described in paragraph (2)(E) were well below the actual lease value of the property.

(4) The approaching expiration of the Salamanca and congressional village leases on February 19, 1991, has created significant uncertainty and concern on the part of the city of Salamanca and Salamanca residents, and among the residents of the congressional villages, many of whose families have resided on leased lands for generations.

(5) The future economic success of the Seneca Nation, city, and congressional villages is tied to the securing of a future lease agreement.

(6) The Federal and State governments have agreed that there is a moral responsibility on the part of both governments to help secure a fair and equitable settlement for past inequities.

"(b) PURPOSE.—It is the purpose of this Act—

(1) to effectuate and support the Agreement between the city and the Seneca Nation, and facilitate the negotiation of new leases with lessees in the congressional villages;

(2) to assist in resolving the past inequities involving the 1890 leases and to secure fair and equitable compensation for the Seneca Nation based on the impact of these leases on the economy and culture of the Seneca Nation;

(3) to provide a productive environment between the Seneca Nation and lessees for negotiating the leases provided for under the Agreement;

(4) to provide stability and security to the city and the congressional villages, their residents, and businesses;

(5) to promote the economic growth of the city and the congressional villages;

(6) to promote economic self-sufficiency for the Seneca Nation and its members;

(7) to promote cooperative economic and community development efforts on the part of the Seneca Nation and the city; and

(8) to avoid the potential legal liability on the part of the United States that could be a direct consequence of not reaching a settlement.

"SEC. 3. DEFINITIONS.

"For the purposes of this Act—

(1) the term '1890 lease' means a lease made by the Seneca Nation which is subject to—

(A) the Act entitled 'An Act to authorize the Seneca Nation of New York Indians to lease lands within the Cattaraugus and Allegany reservations, and to confirm existing leases' approved February 19, 1875 (chap. 90, 18 Stat. 330); and

(B) the Act entitled 'An Act to authorize the Seneca Nation of New York Indians to lease lands within the Cattaraugus and Allegany Reservations, and to confirm existing leases' approved September 30, 1890 (chap. 1132, 26 Stat. 558);

(2) the term 'Agreement' means the document executed by the Seneca Nation and the city entitled 'Agreement between the Seneca Nation of Indians and the City of Salamanca', including the appendix to the Agreement;

(3) the term 'city' means the city of Salamanca, New York;

(4) the term 'lessee' means the holder of an 1890 lease which either expires in 1991 or is one of the leases listed in document 1 of the Technical Documents, including any lessee who holds an 1890 lease by reason of assignment, inheritance, or other manner as provided by the Act referred to in paragraph (1)(A);

(5) the term 'memorandum of understanding' means an agreement between the State and the Seneca Nation pertaining to the payment of the funds to be provided pursuant to this Act, which memorandum of understanding reflects an agreement between the Seneca Nation and the State concerning a mechanism and schedule of payments for the funds described in section 6(c);

(6) the term 'Secretary' means the Secretary of the Interior;

(7) the term 'Seneca Nation' means the Seneca Nation of Indians of the Allegany, Cattaraugus, and Oil Spring Reservations;

(8) the term 'State' means the State of New York;

(9) the term 'Technical Documents' means the documents which comprise the appendix to the Agreement; and

(10) the term 'congressional villages' means the villages of Carrollton, Great Valley, and Vandalia in the State of New York.

"SEC. 4. NEW LEASES AND EXTINGUISHMENT OF CLAIMS.

"(a) NEW LEASES.—If the Seneca Nation offers new leases in accordance with the Agreement, this Act shall apply with respect to the Seneca Nation. The Seneca

Nation shall supply copies of such leases to the Secretary and shall certify in writing that it has supplied the Secretary with copies of written offers to all lessees entitled to an offer.

"(b) EXTINGUISHMENT OF CLAIMS.—The Seneca Nation shall execute appropriate documents relinquishing all claims against the United States, the State, the city, the congressional villages, and all prior lessees for payment of annual rents prior to February 20, 1991, with respect to all prior and existing leases.

"(c) EFFECTIVE DATE OF LEASES AND RELINQUISHMENTS.—(1) The relinquishment of claims against the United States shall be effective upon payment by the United States to the Seneca Nation of the funds provided in section 6 of this Act.

(2) The offers, and any acceptances thereof, referred to in subsection (a), and the relinquishment of claims against the State, the city, the congressional villages, and all prior lessees for payment of annual rents referred to in subsection (b) shall not be binding on the Seneca Nation until after the later of the dates on which (1) Congress, or (2) the legislature of the State appropriates the amount of funds set forth in section 6 of the Seneca Nation and the State agree upon a schedule and mechanism for payments for funds pursuant to section 6(c). Such agreement shall render the offers, acceptances and the relinquishment effective so long as the payments are made as agreed upon by the Seneca Nation and the State.

"SEC. 5. RESPONSIBILITIES AND RESTRICTIONS.

"(a) SENECA NATION.—The Congress finds that the Seneca Nation is solely responsible for negotiation of the leases under the Agreement in its own interest and

approval of any such lease by the United States is not required.

"(b) LESSEES.—The Congress finds that—

(1) the lessees of leases with the Seneca Nation are responsible for representing their own interest in lease negotiations with the Seneca Nation; and

(2) nothing in this Act shall be construed to prevent the lessees from collectively negotiating with the Seneca Nation regarding such leases, whether through informal groups or as delegations formally sanctioned by either the State or local governments.

"(c) UNITED STATES.—(1) The United States shall not serve in a capacity to approve leases of the Seneca Nation.

(2) Federal funds may not be obligated or expended, directly or indirectly, for annual payments under any such lease, except for funds that may be available under a conventional, nationwide program.

"(d) STATE.—(1) The State shall not serve in a capacity to approve leases of the Seneca Nation.

(2) State funds may not be obligated or expended, directly or indirectly, for annual payments under any such lease.

"SEC. 6. SETTLEMENT FUNDS.

"(a) IN GENERAL.—In recognition of the findings and purposes specified in section 2, the settlement funds provided pursuant to this Act shall be provided by the United States and the State. The Secretary may not obligate or expend funds provided under subsection (b)

until the Secretary determines that there is an agreed upon and signed memorandum of understanding.

"(b) FUNDS PROVIDED BY UNITED STATES.—

(1) CASH PAYMENT.—The Secretary shall pay to the Seneca Nation the amount of $30,000,000, which is the Federal share of the cash payment to be managed, invested, and used by the Nation to further specific objectives of the Nation and its members, all as determined by the Nation in accordance with the Constitution and laws of the Nation.

(2) ECONOMIC DEVELOPMENT.—(A) In addition to the amount provided under paragraph (1), the Secretary shall pay to the Seneca Nation the amount of $5,000,000 to be used for the economic and community development of the Seneca Nation, including the city of Salamanca, which is an integral part of the Seneca Nation's Allegany Reservation. Such amount shall be deposited by the Secretary, administered, and disbursed in accordance with subparagraph (B).

(B)(i) The sum of $2,000,000 shall be deposited in a separate interest bearing account of the Seneca Nation. The account shall be administered, and the principal and interest thereon disbursed, by the Seneca Nation in accordance with a plan approved by the Council of the Seneca Nation to promote the economic and community development of the Seneca Nation. Until the principal is expended pursuant to such plan, the income accruing from such sum shall be disbursed to the treasurer of the Seneca Nation on a quarterly basis to fund tribal government operations and to provide for the general welfare of

the Seneca Nation and its members. The Seneca Nation may in its discretion add the accrued income to the principal.

(ii) The sum of $3,000,000 shall be deposited in an escrow account which shall be owned by the Seneca Nation. The escrow agent shall be selected by agreement of the Seneca Nation and the city. The escrow account shall remain in existence for a period of ten years from the date on which the principal is deposited or until all payments provided for under section V.D. of the Agreement have been made. The escrow account shall be held and disbursed for economic and community development as set forth in section V.D. of the Agreement. Upon the expiration of the ten-year period, the $3,000,000 principal shall be disbursed in accordance with a plan approved by the Council of the Seneca Nation to promote the economic and community development of the Seneca Nation.

"(c) FUNDS TO BE PROVIDED BY THE STATE.—The State, in accordance with its laws and regulations, shall provide the sum of $16,000,000 in cash payments and $9,000,000 for economic or community development subject to the provisions of the memorandum of understanding.

"(d) TIME OF PAYMENTS.—The payments required by this section on the part of the United States shall be made within 30 days of the Secretary's determination that the Seneca Nation has complied with section 4, or upon the availability of the amounts necessary to carry out this Act, if such determination has previously been made. If the Secretary determines that the Seneca Nation has not complied with section 4, he shall advise the Seneca Nation in writing of all steps it must take to comply.

"(e) LIMITATION.—The only amounts available to carry out this Act shall be those amounts specifically appropriated by the Congress or the legislature of the State to carry out this Act.

"SEC. 7. CONDITIONS PRECEDENT TO PAYMENT OF UNITED STATES AND STATE FUNDS.

"Amounts may not be expended from—

(1) the $30,000,000 and the $5,000,000 provided by the United States under section 6(b), and

(2) the $16,000,000 and $9,000,000 provided by the State under section 6(c),

until after the authorized officials of the Seneca Nation execute new leases with all lessees who accept the Seneca Nation's offer of a new lease, as filed with the Secretary under section 4(a), and execute approriate documents relinquishing all claims for payment of annual rents prior to February 20, 1991, with respect to such leases.

"SEC. 8. MISCELLANEOUS PROVISIONS.

"(a) LIENS AND FORFEITURES, ETC.—Subject to subsection (b), the provisions of section 7 of the Indian Tribal Judgment Funds Use and Distribution Act (25 U.S.C. 1407) shall apply to any payment of funds authorized to be appropriated under this Act and made to individual members of the Seneca Nation. None of the payments, funds, or distributions authorized, established, or directed by this Act, and none of the income derived therefrom, which may be received under this Act by the Seneca Nation or individual members of the Seneca Nation, shall be subject to levy, execution, forfeiture, garnishment, lien, encumbrance, seizure, or State or local taxation.

"(b) ELIGIBILITY FOR GOVERNMENT PROGRAMS.—None of the payments, funds or distributions authorized, established, or directed by this Act, and none of the income derived therefrom, shall affect the eligibility of the Seneca Nation or its members for, or be used as a basis for denying or reducing funds under, any Federal program.

"(c) LAND ACQUISITION.—Land within its aboriginal area in the State or situated within or near proximity to former reservation land may be acquired by the Seneca Nation with funds appropriated pursuant to this Act. State and local governments shall have a period of 30 days after notification by the Secretary or the Seneca Nation of acquisition of, or intent to acquire such lands to comment on the impact of the removal of such lands from real property tax rolls of state political subdivisions. Unless the Secretary determines within 30 days after the comment period that such lands should not be subject to the provisions of section 2116 of the Revised Statutes (25 U.S.C. 177), such lands shall be subject to the provisions of that Act and shall be held in restricted fee status by the Seneca Nation. Based on the proximity of the land acquired to the Seneca Nation's reservations, land acquired may become a part of and expand the boundaries of the Allegany Reservation, the Cattaraugus Reservation, or the Oil Spring Reservation in accordance with the procedures established by the Secretary for this purpose.

"SEC. 9. LIMITATION OF ACTION.

"Notwithstanding any other provision of law, any action to contest the constitutionality or validity under law of this Act shall be barred unless the action is filed on or before the date which is 180 days after the date of

enactment of this Act. Exclusive jurisdiction over any such action is hereby vested in the United States District Court for the Western District of New York.

"SEC. 10. AUTHORIZATION OF APPROPRIATIONS.

"There is authorized to be appropriated such sums as may be necessary to carry out this Act.

Approved, November 3, 1990."